IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

ITR No.134 of 1989
Date of decision:22.9.2006

M/s. Dalima Biscuits (P) Limited, Rajpura

....Petitioner

versus

The Commissioner of Income Tax, Patiala.

Respondent.

CORAM: HON'BLE MR. JUSTICE ADARSH KUMAR GOEL
HON'BLE MR. JUSTICE RAJESH BINDAL

Present: Mr. P.C.Jain, Advocate, for the petitioner.
Dr. N.L.Sharda, Advocate, for the respondent-revenue.

JUDGMENT:

Following question of law has been referred for opinion of this Court by the Income Tax Appellate Tribunal, Chandigarh Bench, Chandigarh, arising out of its order dated 15.12.1989 in ITA No.601 of 1984, in respect of assessment year 1979-80:-

> "Whether the Tribunal, on the nature of the case, was justified in law in holding that even under section 37(1), the retainership fee paid on monthly basis to Shri D.N. Banerjee, Advocate was disallowable?"

Facts noticed by the Tribunal in the statement of case are that:-

> "The assessee company incurred on expenditure of Rs.2250/- on fee paid to Shri G.C.Sharma, Sr.Advocate and Rs.30,920/- on account of retainership fee paid to Shri D.N. Banerjee. The Assessing Officer observed that

in the immediately preceding assessment year, Shri D.N.Banerjee had rendered advice on taxation matters only and had been sending the bills to the company relating to income tax matters for the assessment year 1979-80 under appeal. It was contended before the Assessing Officer that Shri D.N.Banerjee was an advocate and had rendered advice on other matters also. The assessing Officer, however, observed that copies of the bills of Shri D.N.Banerjee showed that they were for advice rendered on various legal matters and the details of the advice given or assistance rendered were not made available. On the other hand, the company was paying retainership fee to other Advocates like S/Shri Madan Lal Gupta, S.I.Aggarwal and PP Bedi who advised the company on labour matters. He further noted that even the fee given to Shri G.C.Sharma who is a known Advocate in income tax matters was for consultations made with Shri D.N.Banerjee. In view of the above facts, the Assessing Officer came to the conclusion that Shri Banerjee was paid retainership fee for taxation matters only. He, therefore, considered the allowability under section 80VV of the Income Tax Act and allowed the maximum deduction of Rs.5000/- admissible thereunder and the balance of Rs.28,170/- was disallowed. On appeal, the Commissioner of Income Tax (Appeals) for the discussions made in para 2 of his order restricted the disallowance to Rs.10,000/-. In other words, he allowed relief to the assessee to the extent of Rs.18,170/-."

The Tribunal decided the issue against the assessee. It was held that the assessee failed to establish that the expenditure incurred was wholly and exclusively for the purpose of business.

We have heard learned counsel for the parties and perused the record.

On general principle, fee paid to professional advisors was allowable. Reference may be made to judgment of the Hon'ble Supreme Court in ***C.I.T. v. Birla Cotton Spinning and Weaving Mills Ltd.*** (1971) 82 ITR 166, wherein it was observed:-

> "The essential test which has to be applied is whether the expenses were incurred for the preservation and protection of the assessee's business from any such process or proceedings which might have resulted in the reduction of its income and profits and whether the same were actually and honestly incurred. It is not possible to understand how the expenditure on the proceedings in respect of the Investigation Commission by the assessee will not fall within the above rule. Even otherwise, the expenditure was incidental to the business and was necessitated or justified by commercial expediency. It must be remembered that the earning of profits and the payment of taxes are not isolated and independent activities of a business. These activities are continuous and take place from year to year during the whole period for which the business continues. If the assessee takes any steps for reducing its liability to tax which result in more funds being left for the purpose of carrying on the business there is always a possibility of higher profits...."
> ".....The expenditure which was incurred by the assessee in opposing a coercive governmental action with the object of saving taxation and safeguarding business was justified by commercial expediency and was, therefore, allowable under Section 10(2)(xv) of the Act."

However, Section 80VV of the Income Tax Act, 1961 (for short, 'the Act') , which was in force during the relevant assessment year, did not allow any expenditure on this account in excess of Rs.5000/-. Even after the above statutory amendment, it was held in ***K.L.Poddar and* Sons P*vt. Limited v. CIT,(***1991) 191 ITR 365 (Karnataka) that Section 80VV of the Act was

concerned only with representation before authorities/court, while the fee could be paid even for general consultation, which is not covered under section 80VV of the Act. Relevant observations are: -

> "It is well known fact that retainer fees are paid towards general consultations, may be under particular legislations. A counsel is retained so that the assessee may have the benefit of proper legal advice as and when problems arise. The assessee may also resort to a consultation with the tax consultant for the purpose of tax planning. There may be other questions arising in the course of the assessee's business touching upon the taxation laws. These problems cannot be separated itemwise nor can the fee paid to the consultant regarding income tax cases before the authorities and fee paid regarding other matters be apportioned. The retainer fee is to be considered as one entity for the entire services kept ready by counsel as and when the assessee seeks the advice."

In ***Commissioner of Income-Tax*** ***v.*** ***Volga Restaurant*** (2002) 253 ITR 405 (Delhi), it was observed :

> "For the assessment years 1976-77 to 1985-86, the section permitted deduction of Rs. 5,000 in respect of an expenditure incurred by the assessee in the relevant accounting year in respect of the proceedings under the Act before the income-tax authority, or the Tribunal or any Court relating to the determination of any liability under the Act by way of tax, penalty or interest. The Tribunal had noted that the amount was paid as retainer fee and was not relatable to any proceedings for determination of any liability under the Act by way of tax, penalty or interest. That being the factual conclusion, the answer to the second question is in the affirmative, in favour of the assessee and against the Revenue."

The Tribunal in the present case recorded the following finding:-

> "12. We have given our careful consideration to the rival submissions. While we agree with the learned counsel for the assessee that restriction imposed under section 80VV will be in respect of the expenditure which has been incurred in connection with the income tax proceedings before the assessing authority or the appellate authorities. The expenditure incurred which is not in relation to such proceedings will be admissible as deduction under section 37 of the Income Tax Act provided it is incidental to business and has been incurred for the purpose of earning profits. Major item of expenditure is of Rs.25,769/- on Shir D.N.Banerjee who is standing counsel of the assessee and has been paid retainership fee. In fact, during the course of hearing of the appeal he was present with Shri G.C.Sharma, the learned Senior Advocate. Shri Banerji conceded during the course of hearing before us that he has been appearing before the I.T.Appellate Authorities. The paper-books prepared bears the signatures of Shri Banerjee. This clearly showed that Shri Banerjee has rendered services in connection with proceedings before the Income Tax authorities. In the paper-book he has made written arguments on various issues quoting the various judicial pronouncements. The Assessing Officer has clearly recorded a finding that the assessee-company could not furnish before him as to what other services were rendered prior to the commencement of the Income tax proceedings envisaged under section 80VV. The application of provisions of section 37(1) could be considered only if the nature of services rendered by Shri Banerjee and other Advocates/Chartered Accountants is made available. No attempt has been made on behalf of

> the assessee to indicate the nature of such services. Even it is not indicated as to whether the other persons except Shri B.L.Khanna were Chartered Accountants or Advocates and what services they have rendered to the assessee-company. The decision of the Calcutta Bench can be of aid to the assessee only if the details of the services rendered by the various persons mentioned earlier are known. No case has been made out even for restoring the issue to the file of the CIT(A) by giving some prima facie information about the nature of the services rendered. In such circumstances, we are unable to uphold the action of the CIT(A) in allowing deduction of Rs.24000/- instead of Rs.5000/- allowed by the Assessing officer. We, however, sustain the disallowance made by him at Rs.7,869/-."

In view of finding recorded by the Tribunal, it has to be held that the expenditure claimed was only in respect of representation before the ITAT. In such a situation, the issue will stand covered by the provisions of Section 80VV of the Act. No fault can, thus, be found with the finding recorded by the Tribunal.

For the above reasons, the question referred is decided against the assessee and in favour of the revenue.

Reference is disposed of accordingly.

(Adarsh Kumar Goel)
Judge

Sept. 22, 2006 (Rajesh Bindal)
'gs' Judge